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**UNITED STATES BANKRUPTCY COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

In Re:

KATHARINA HARMON,  
Debtor.

Case No. 11-54401 ASW

Chapter 13

**OPPOSITION TO MOTION FOR  
ORDER TERMINATING AUTOMATIC  
STAY**

Date: July 1, 2011

Time: 2:00 p.m.

Judge: Arthur S. Weisbrodt

Courtroom: 3020

**DEBTOR'S OPPOSITION TO GOLDEN GATE GENERAL GROUP, LLC  
MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

Katharina Harmon, the Debtor herein, opposes the motion of Creditor Golden Gate General Group, LLC ("Movant") for relief from stay on the grounds that title to the Property has not been perfected, Movant lacks standing to seek relief, acts done by Movant are void as they were done in violation of the automatic stay, equity in the property makes it necessary for this Debtor's reorganization, and certain equitable arguments.

**A. INTRODUCTION AND FACTUAL BACKGROUND**

Katharina Harmon filed her petition for bankruptcy protection on May 6, 2011 at 3:15 p.m. Unbeknownst to her, on the same date at 1:15 p.m., the trustee sale of her home at 4436 Faulkner Drive, in Fremont, in the County of Alameda, (“the Property”) took place. (See Dec. of Katharina Harmon, p. 2, lines 6-7.) On or about May 10, 2011, Michael Zhang, a representative for Movant, visited the Property and met Ms. Harmon’s mother. Mr. Zhang stated that he was aware Ms. Harmon had filed for bankruptcy and stated that they must vacate the Property. (See Dec. of Karola Anderson, p. 2, lines 1-6.) Despite this, Mr. Zhang left a three-day notice to vacate the Property. (See Dec. of Karola Anderson, p. 2, lines 6-8.)

On or about June 7, 2011, over thirty one days after the trustee sale, Movant recorded the trustee’s deed upon sale with the Alameda County Recorder’s Office, without permission of this Court and in violation of the automatic stay. Although Movant’s title to the Property may have been perfected had they recorded within 15 days, Movant does not hold valid title to the Property as its recording is void.

Without valid title and therefore no standing, Movant has now filed this Motion Requesting Relief From the Automatic Stay in order to continue with an unlawful detainer action against Ms. Harmon and the occupants of the home.

**B. LEGAL ARGUMENT**

**I. Title To The Property Is Not Perfected As Movant Recorded Its Deed More Than 15 Days After the Sale**

Pursuant to Section 2924h of the California Civil Code, a “trustee’s sale is deemed perfected as of 8 a.m. on the actual date of sale **if the trustee’s deed is recorded within 15 calendar days after the sale[.]**” (emphasis added.) The trustee sale allegedly took place on

1 May 6, 2011; the trustee's deed was recorded on June 7, 2011, over 31 days later. "If the  
2 foreclosure sale purchaser fails to record its deed within fifteen days of the sale, the perfection  
3 will not relate back to the date of the sale." *In Re Garner (1997) 208 B.R. 698, 701.*  
4 Recordation of the deed within fifteen days of the sale is critical to the outcome of a motion for  
5 relief under these circumstances. *Ibid at 701.* Without perfecting their interest in the Property,  
6 Movant lacks standing necessary to seek relief.  
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8 "Until the deed from a prepetition foreclosure sale is recorded, a debtor retains legal title  
9 to the property. If the debtor files bankruptcy immediately following the sale, the legal title  
10 accompanies the debtor into bankruptcy, and becomes property of the estate. Once included in  
11 the estate, legal title becomes subject to the protection of the Code, and any transfers in legal  
12 title may not transpire without complying with the Code provisions. *Davisson v. Engles (In re*  
13 *Engles)*, 193 B.R. 23, 25 (Bankr. S.D. Cal. 1996).  
14

15 Title to the Property has not been perfected. Movant's recording of the Trustee's Deed  
16 Upon Sale was done well after the 15-day statutory timeline for recording a deed and perfecting  
17 title after a trustee sale.  
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## 19 **II. Acts Done in Violation of the Automatic Stay are Void**

20 The Ninth Circuit follows the majority view in holding that acts done in violation of the  
21 automatic stay are void. *In Re Wardrobe* (9<sup>th</sup> Cir. 2009) 559 F3d 932, 934. "Void" acts have  
22 no force or effect and cannot be cured or ratified. As a result, the debtor does not have to take  
23 any action to "undo" the act. *In Re Schwartz* (9<sup>th</sup> Cir. 1992) 954 F2d 569, 571.

24 Movant has committed two acts in violation of the automatic stay. First, with actual  
25 notice of the bankruptcy, on or about May 10, 2011, Movant posted a three-day notice to vacate  
26 the Property. Second, on or about June 7, 2011, Movant recorded the trustee's deed upon sale  
27 with the Alameda County Recorder's Office. Although actions taken to perfect a title interest  
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1 within the first fifteen days after a trustee's sale are not considered to be violations of the stay,  
2 actions taken sixteen days and beyond are. Civ. Code §2924h. Movant waited for over one  
3 month from the time of purchase to record their title interest. During this month, they received  
4 notice of the bankruptcy both from Ms. Harmon's mother, from counsel for Debtor and through  
5 independent research conducted by Movant. Clearly, Movant was well aware of the bankruptcy  
6 petition and automatic stay yet still took steps to post a three-day notice and record the trustee's  
7 deed upon sale beyond the statutory timeline allowed.

8  
9 "[S]ection 362 contains certain exceptions to the bar of the automatic stay. One of those  
10 exceptions-- 11 U.S.C. § 362(b)(3)--relates to an act to perfect an interest in property that,  
11 pursuant to 11 U.S.C. § 546(b), would prevail over certain of the trustee's avoiding powers.  
12 Section 546(b) provides, in pertinent part, that a trustee's power to avoid an interest under  
13 section 544 is subordinate to "any generally applicable law that...permits perfection of an  
14 interest in property to be effective against an entity that acquires rights in such property before  
15 the date of perfection;.." This is just what the amended version of section 2924h(c) does  
16 **provided, that is, the purchaser records its deed within fifteen days of the sale.** *In re*  
17 *Garner*, 208 B.R. 698, 700-701 (Bankr. N.D. Cal. 1997) (emphasis in original). Conversely,  
18 recording after fifteen days of the sale, without leave of court, does violate the automatic stay.  
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21 Specific intent to violate the stay is not required. A violation of the automatic stay is  
22 "willful" if the defendant had actual knowledge of the automatic stay and defendant's acts were  
23 intentional. It need not be shown that defendant knew its acts constituted a violation of the stay.  
24 *Sternberg v. Johnston* (9<sup>th</sup> Cir. 2010) 595 F3d 937, 945; *In re Pace* (9<sup>th</sup> Cir. 1995) 67 F3d 187,  
25 191. Although Movant may plead ignorance of what constitutes a violation of the automatic  
26 stay, Movant was well aware of the bankruptcy action, took intentional steps to provide a three-  
27 day notice, and to record their trustee's deed upon sale. "Once a creditor knows that the  
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1 automatic stay exists, the creditor bears the risk of all intentional acts that violate the automatic  
2 stay regardless of whether the creditor means to violate the automatic stay.” *In re Champion* (9<sup>th</sup>  
3 Cir. BAP 2003) 294 BR 313, 318. Even without written notice, Movant had constructive  
4 knowledge based on conversations with the debtor’s mother, counsel for the debtor, and  
5 independent research performed by Movant. “Informal” notice, including oral notice,  
6 constitutes notice sufficient for a finding of willfulness. *In re Abrams* (9<sup>th</sup> Cir. BAP 1991) 127  
7 BR 239, 240-44.  
8

9 Movant’s violation of the automatic stay renders both the three-day notice it posted on  
10 May 7, 2011 and the recording of the trustee’s deed upon sale void. Movant’s must take steps  
11 to cancel the recorded trustee’s deed upon sale. This Court should also award sanctions in the  
12 form of attorneys’ fees and costs for Movant’s willful violation of the automatic stay.  
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14 In support of debtor’s request for punitive sanctions, on or about June 14, 2011, Movant  
15 received notice that their actions were done in violation of the stay and that debtor would seek  
16 sanctions in the form of attorneys’ fees and costs if this motion was not taken off calendar.  
17 Movant’s refusal to voluntarily withdraw this motion also supports punitive sanctions.  
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19 The Court must award actual damages, including costs and attorney fees to any  
20 individual injured by a willful violation of the automatic stay. Damages for willful violation of  
21 stay allow recovery of actual damages, which includes costs and attorney fees, and may result in  
22 a punitive damages award. 11 U.S.C. Sec. 362(k).

23 If the court is not inclined to award Debtor the fees and expenses of opposing this  
24 Motion, Debtor is prepared to bring a separate motion for violation of the automatic stay against  
25 Movant.

26 **III. The Property is Necessary for the Debtor’s Reorganization**  
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1 Movant's request for relief from the automatic stay cannot be granted because even if  
2 there is value in debtor's title to the property. Debtor has equity in the property and it is  
3 necessary for effective reorganization. At the time of filing, as Movant had not perfected their  
4 security interest in the Property, debtor held bare legal title which is of value to the estate. Bare  
5 legal title may be of great value to the bankruptcy estate if it enables the trustee to avoid the  
6 unperfected transfer of the real property. For example, in *In re Williams*, 124 B.R. 311 (Bankr.  
7 C.D. 1991)--a case decided before the amendment of section 2924h(c) of the California Civil  
8 Code--a chapter 7 debtor, exercising the trustee's avoiding powers pursuant to 11 U.S.C. §  
9 522(h), was permitted to avoid such a transfer under then applicable law.  
10 *In re Stork*, 212 B.R. 970, 971-972 (Bankr. N.D. Cal. 1997). As debtor has numerous claims  
11 against the original lender and selling beneficiary, Bank of America, and is prepared to file an  
12 adversary proceeding for a declaration of rights and to set-aside the trustee's sale, debtor's  
13 interest and equity in the Property must be protected as property of the estate.  
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16 **IV. A Post-Petition Property Transfer May be Avoided Pursuant to 11 U.S.C.**  
17 **Sec. 549(a)**

18 "While acceptance of the highest bid may complete a foreclosure sale, in California it is  
19 recordation of the sale, rather than its consummation, that perfects the transfer of the property  
20 against avoidance by a trustee in bankruptcy. The conclusion to be drawn from this authority is  
21 that, while acceptance of the highest bid may complete a foreclosure sale, it is recordation of the  
22 sale, rather than its consummation, that perfects the transfer of the property against avoidance  
23 by a trustee in bankruptcy." *In re Duncombe*, 143 B.R. 243, 246 (Bankr. C.D. Cal. 1992). As  
24 Movant's delayed recording of the trustee's deed upon sale in violation of the automatic stay is  
25 void, title has still not been perfected. Further, as debtor recorded a notice of their bankruptcy  
26 filing on June 8, 2011 before a valid recording of the trustee's deed upon sale, the trustee's deed  
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1 may be avoided pursuant to 11 U.S.C. Sec. 549(a). See Docket No. 18, Notice of Pendency of  
2 Action.

3 **V. Failure to Include Post-Petition Account Statement Will Allow the**  
4 **Imposition of Sanctions**

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6 Movant's Motion for Relief From Stay contends that neither debtor or any occupants are  
7 paying payments to reside in the property. (Motion For Relief From Stay, p.2, lines 7-11). On  
8 or about June 13, 2011, Debtor made a payment to Bank of America, original lien holder  
9 pursuant to its request for post-petition payments. (See Declaration of Katharina Harmon, p. 2,  
10 lines 20-21.) Movant's contentions do not provide for the inclusion of an account statement and  
11 declaration attesting to the statement's accuracy as required by BKR 4001-1(g). Movant's  
12 counsel received notice of its failure to provide an account statement and declaration supporting  
13 its contentions on or about June 14, 2011, yet has failed to take any steps to file an amendment  
14 and/or withdraw their Motion. (See Declaration of Elena Rivkin Franz, p. 2, line 5- p. 3, line  
15 12.) Pursuant to BKR 4001-1(g)(3), the Court may impose monetary or nonmonetary remedies  
16 as appropriate.  
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18 **VI. Equitable Arguments Support Denying Motion for Relief From Stay**

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20 The Property holds substantial equity and has been in Debtor's family for many years.  
21 In fact, Debtor's mother lives in the Property now. Prior to the foreclosure sales date, Debtor  
22 was told by Bank of America's agents and employees that the foreclosure sale was stalled and  
23 would not proceed on May 6, 2011; Debtor detrimentally relied on these statements by Bank of  
24 America agents. Debtor had an active loan modification pending at the time of the alleged  
25 trustee sale, and did not receive a determination on her request until June 2, 2011. Pursuant to  
26 Bank of America's response to her request, she had through July 2, 2011 to appeal the June 2,  
27 2011 denial of her modification request. (See Dec. of Katharina Harmon, p. 2, lines 15-18.)  
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Debtor has a claim against Bank of America for these violations, including breach of contract, breach of duty of good faith and fair dealing, and related claims, and may bring an adversary proceeding against Bank of America to set-aside the sale.

### **III. CONCLUSION**

Based upon the foregoing, Debtor respectfully requests that:

1. This Court DENY Movant's Motion for Relief From Stay.
2. This Court award sanctions in the form of attorneys' fees and costs for Movant's willful violation of the automatic stay.
3. This Court award punitive sanctions against Movant for willful violation of the automatic stay after official knowledge.
4. This Court award sanctions against Movant for failure to include an account statement and declaration supporting its contentions that Debtor has not made any post-petition account statements.

Dated: June 17, 2011

THE MLNARIK LAW GROUP, INC.

/s/ John L. Mlnarik  
JOHN L. MLNARIK  
Attorney for Debtor